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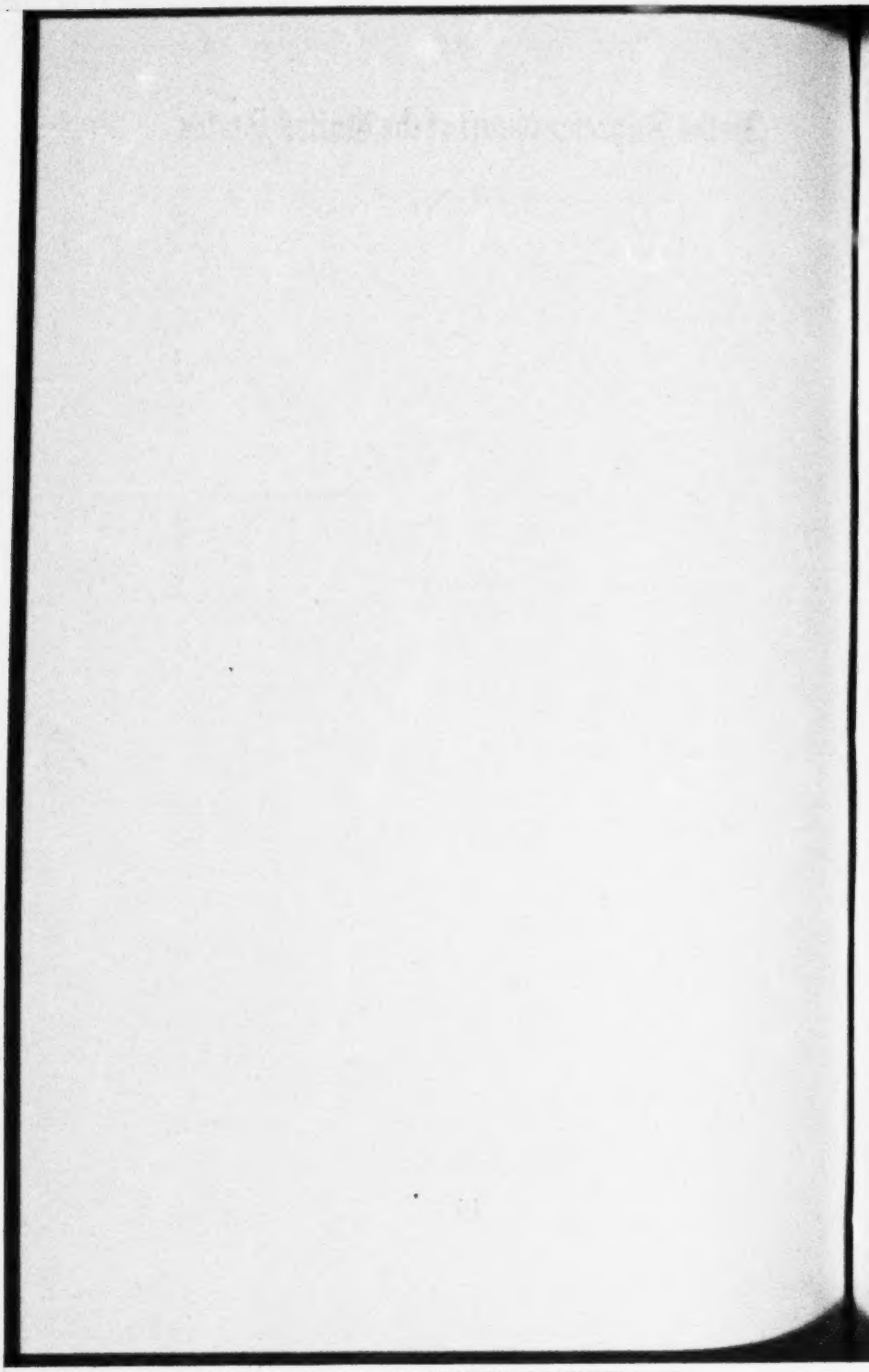
CITATIONS

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Statutes and Rule involved:

United States Code:	
18 U.S.C. 242	2, 4, 10
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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 199

BRUNO A. KOEHLER AND HUGO W. ACKERMANN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 376-384) are reported at 189 F. 2d 711.

JURISDICTION

The judgment of the Court of Appeals was entered on May 25, 1951 (R. 384), and a petition for rehearing was denied on June 25, 1951 (R. 389). The petition for a writ of certiorari was filed on July 23, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether a state officer who arrests a person under color of his office is acting under color of law within the meaning of 18 U.S.C. 242 where, subsequent to the arrest, he subjects the prisoner to illegal assault and battery.

2. Whether the instructions to the jury on the requirement of intent were correct.

3. Whether the trial judge on his own motion should have instructed the jury as to the law of circumstantial evidence as applied to conspiracy where the conviction did not depend upon circumstantial evidence.

STATUTES AND RULE INVOLVED

18 U.S.C. 242:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency

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thereof in any manner of for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Rule 30, F. R. Crim. P.:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

Petitioners were convicted in the District Court for the Western District of Texas on both counts of an information (R. 2-5). The first count, under

18 U.S.C. 371, charged that petitioner Koehler, a duly elected constable of Guadalupe County, Texas, acting under color of the laws and statutes of Texas creating his office and prescribing its duties, and petitioner Ackermann conspired to wilfully subject Efram Rasberry to the deprivation of his rights, privileges and immunities under the Fourteenth Amendment to be secure in his person while in custody and not to be punished without due process of law. The object of the conspiracy was alleged to be illegal summary punishment of Rasberry. Seven overt acts were set out. The second count, under 18 U.S.C. 242, alleged that Koehler, aided and abetted by Ackermann, wilfully subjected Rasberry to the deprivation of specified rights under the Fourteenth Amendment by arresting him and assaulting him for the purpose of inflicting summary punishment. Petitioners were tried before a jury, found guilty on both counts (R. 359), and each was sentenced generally to pay a fine of $500 and to six months' imprisonment (R. 362-363).

The evidence shows that Efram Rasberry, a middle-aged Negro in rather poor health (R. 226), accompanied by a Negro minister named Ernest Benzs, were traveling in an automobile toward Marion, Texas, on the night of August 23, 1949. When they arrived at a place called Cibolo Creek a number of hounds belonging to petitioner Koehler, a qualified constable (R. 34-40), began to run across the highway. Rasberry, who was driv-

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ing, slowed the car, and one of the hounds was either hit by the car or ran into it. Rasberry and Benzs did not stop but proceeded on to Marion, pursued by Koehler and his "deputy" (R. 175, 212-214, 272) Ackermann, in an automobile. (R. 41, 74.) Petitioners sounded their siren (R. 86, 156, 163, 206), flashed their red search light (R. 86, 206), and finally forced Rasberry to the curb (R. 206). At this time Koehler stated: "Why didn't you stop, didn't you know I am the Law?" Rasberry replied: "Yes sir, Mr. Koehler, I know you are the Law." (R. 163.) Koehler then stated: "Get out of here; you are under arrest" (R. 225). Koehler then pulled Rasberry out of his car (R. 41, 75), after which both Koehler and Ackermann beat him with their fists or other weapons (R. 41, 75, 156-157, 207), while Benzs hid in some bushes to avoid capture.

Thereafter, petitioners took Rasberry to a saloon in Marion owned by Koehler, where he was held in custody (R. 92-93), without anyone being permitted to see him (R. 78). During the time Rasberry was in custody in the saloon, Ackermann picked up a pet alligator owned by Koehler and kept in a washtub in the saloon, and placed it against Rasberry's bare stomach (R. 94). Koehler pointed a pistol at Rasberry and told him to say his prayers; that if the dog died, he would hang Rasberry and that while Rasberry was hanging he would stay nearby with a gun, so that no one could

cut him down. Ackermann also drew his pistol. (R. 94-95.)

Later petitioners placed Rasberry in their car and drove to the home of one Robert Miller where the following conversation took place (R. 95-97, 126):

> Koehler: "That is old Rasberry; he has been out with your daughter, running around with your daughter, and I am going to put him in jail, and I want you to take my gun and kill him."
>
> Miller: "No, I could not do nothing like that."
>
> Koehler: "You don't want to kill him he has been out with Herbert Butler's wife [Miller's daughter] * * * If you haven't got any gun, come on over; I am going to put him in jail; come on over, and get my gun and kill him. He is running around with your daughter, and he has done run over my dogs, and if you don't kill him, I am going to kill him and her both in the morning, if those dogs die."

Petitioners later placed Rasberry in the Marion jail (R. 97). The following day he was removed to the Guadalupe County Jail (R. 157).

The doctor who was called to examine Rasberry the day after he was beaten testified that at that time his head was swollen, he had a cut on his lower lip and a cut on his head which required stitches, both lips were swollen and lacerated, and he could not talk intelligibly (R. 63-65). Rasberry testified that he was unconscious until the ambu-

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lance came for him the second day following (R. 44). There was testimony that he was unrecognizable the night of the beating (R. 111).

After he had placed Rasberry in jail, Koehler delivered to the local justice of the peace two complaints charging Rasberry with driving a motor vehicle without good brakes and without lights (R. 143-146, 338-339). The complaints were never filed because they were not sworn (R. 145). No other charges were made or filed against Rasberry.

ARGUMENT

1. Petitioners' principal contention[1] is that the Court of Appeals erred in holding that—

[1] Petitioners' argument is seemingly stated in four different ways in numbers 1, 3, 4, and 5 of their questions presented (Pet. 2-3). Actually they argue only the third of these questions (Pet. 11-12).

In their first question (Pet. 2), they query whether assault and battery by an officer followed by later treatment of the victim as a prisoner would violate Section 242. Since the question is based on a false premise it does not merit discussion. The trial judge charged the jury (R. 324) that they must find that "Koehler arrested and detained said Rasberry, and while the said Rasberry was in his custody said Koehler * * * assaulted the said Rasberry for the purpose of inflicting summary punishment." It is unnecessary to summarize once more the substantial evidence which entitled the jury to find that the arrest came before the beating.

In their fourth and fifth questions petitioners suggest that both counts of the indictment should have been quashed because they failed to allege by what authority petitioners purported to act in beating Rasberry. A reading of the counts will show that they used almost the exact language of Section 242. For example, the substantive count alleged that Koehler "under color of the laws and statutes of the State of Texas" subjected Rasberry to deprivation of his rights. Almost the very language of this information was approved in *Catlette* v. *United States*, 132 F. 2d 902 (C.A. 4). If petitioners desired additional information their proper procedure was to request a bill of particulars.

> Where, as here, an individual is apprehended by an officer of the law acting under color of his office, and is badly beaten, intimidated and imprisoned without ever being taken before a committing magistrate or a tribunal which would afford him due process of law and preserve his constitutional rights, manifestly he has been deprived of his rights, privileges and immunities within the meaning of the statute. [R. 379-380.]

The decisions of this Court establish that, on the facts summarized above, petitioners' acts were done under color of law. "It is clear that under 'color' of law means under 'pretense' of law." Douglas, J., in *Screws* v. *United States,* 325 U. S. 91, 111. "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *United States* v. *Classic,* 313 U. S. 299, 326, reiterated by Douglas, J., in the *Screws* case (325 U. S. at 109) and in *Williams* v. *United States,* 341 U. S. 97, 99. In view of petitioner Koehler's official position and the assertion of his authority in arresting Rasberry, there can be no doubt that petitioners acted under color of law. The jury so found under an explicit instruction that before they could convict they must find, *inter alia,* that "Koehler [took] Rasberry into custody under color of law" (R. 322). The trial judge (R. 319), consistently with the decisions of this Court cited

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above, defined "color of law" as "mere semblance of legal right" (see *Williams* v. *United States,* 341 U. S. at 100), which "does not necessarily mean the exercise of some specific legal authority vested in an officer of the law, but also semblance, appearance and pretense and implies, in the language of the statute, that the act to which it applies need not necessarily have the real characteristics of a legal act. Therefore, we do not have in this case any question as to whether the defendant, Koehler, in taking Rasberry into custody, acted under authority of any law of Texas, but whether or not the taking of Rasberry into custody was done under color of the law of Texas, state, county, or municipal, arising out of the official position held by the defendant Koehler." Substantially the same instructions were upheld in *Williams* v. *United States,* 341 U. S. at 100 (compare R. 317-319 with R. 319-321, No. 365, O. T. 1950). As this Court there said, they "drew the line between official and unofficial conduct which we explored in *Screws* v. *United States, supra,* 111, and gave petitioner all of the protection which 'color of' law as used in § 20 [§ 242] offers."

Petitioners' protest that their actions were purely individual, not clothed with and without authority under state law, is therefore unavailing. "The evidence has nullified any pretense that petitioners acted as individuals, about their personal though nefarious business. They used the power of official place in all that was done. The verdict

has foreclosed semblance of any claim that only private matters, not touching official functions, were involved." Rutledge, J., in *Screws* v. *United States,* 325 U. S. at 115; see also *Catlette* v. *United States,* 132 F. 2d 902 (C. A. 4); *United States* v. *Trierweiler,* 52 F. Supp. 4 (E. D. Ill.).

2. Petitioners also contend (Pet. 2, 6, 14-18) that the instructions to the jury were erroneous because they included language to the effect that intent is generally presumed and inferred from action.

On this aspect of the case, the trial judge first told the jury that the word "wilfully" in Section 242 has "a very distinct and definite meaning," and that "It is not sufficient that the defendants here had generally a bad purpose in doing the things they did. In order to convict it is necessary for the jury to find that the defendants had in mind the specific purpose of depriving Rasberry of rights, privileges and immunities secured to him and protected by the Fourteenth Amendment to the Constitution of the United States, to-wit," the rights, privileges, and immunities specified in the information. He also instructed that "in determining whether this requisite of wilful intent was present in this case you are entitled to consider all the attendant circumstances; the malice, if any, of the defendants towards Rasberry, the weapons used in the assault, if you find any were used; and the character and duration of the provocation of the assault and the time and manner

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in which it was carried out. All these facts and circumstances may be taken into consideration from the evidence that has been submitted for the purpose of determining whether the acts of the defendants were wilful and for the deliberate and wilful purpose of depriving Rasberry of his Constitutional right to be tried by a jury just like everyone else." The judge then explained that intent "is something that exists in a man's mind" and which must be judged "by his intelligence, as shown by the evidence; by his experience in life, as shown by the evidence, and generally by judging him as reasonably prudent persons, experienced in the affairs of everyday life, judge each other, and it is the law that a person intends the usual consequences of his acts." (R. 320-321.)

All these instructions were substantially identical with the instructions sustained in *Williams* v. *United States,* 341 U. S. 97 (compare R. 319-321 with R. 322-324, No. 365, O. T. 1950). The judge here added that "The color of the act determines the complexion of the intent," and that "It is a well settled rule, which the law applies to both criminal and civil cases, that the intent is presumed and inferred from the result of the action." (R. 321.) Finally, as in the *Williams* case, the judge instructed (R. 321-322; compare R. 324, No. 365, O. T. 1950):

> The proof of a general intent to do Rasberry wrong is not sufficient, but a specific intent to deprive him of a Constitutional right

is a burden the law casts upon the Government in this case. Neither color of law nor specific intent may be presumed by you gentlemen, but both color of law and specific intent must be proven by the government beyond a reasonable doubt.

Now, in concluding this part of the court's charge, let me summarize the questions you have to determine:

1. Did the defendant Koehler take Rasberry into custody under color of law?

2. Did the defendants specifically intend to deprive Rasberry of a Constitutional right guaranteed to him by our Federal Constitution?

3. Has the Government established these two essentials to your satisfaction beyond a reasonable doubt?

If the Government has done so, it is your duty to find the defendant guilty in this case.

If you have a reasonable doubt upon either of the two essentials named above it is your duty to acquit the defendants.

Petitioners interposed no objection to these portions of the charge (see R. 309, 328), which was submitted to them the day before the jury were instructed (R. 309). They failed to point out the error if any to the court and should not now be heard to complain. Rule 30, F. R. Crim. P.

In any event, the instructions, read as a whole, were not erroneous. In the portion of his instructions now challenged by petitioners, the judge was obviously explaining in a general way how

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the jury should determine whether petitioners had the specific intent to deprive Rasberry of his constitutional rights, which he had previously instructed was a requisite to conviction. The judge did not err in telling the jury that intent is impossible to prove by direct evidence and can only be inferred from action.

Finally, any possible infirmity in the portions of the instructions which petitioners criticize could not possibly have misled the jury as to the intent they must find before they could convict. As has been shown, both before and following the criticized instructions the judge emphasized that a general bad intent was insufficient and that the jury must find that petitioners had a specific intent to deprive Rasberry of his constitutional rights as specified in the information.

3. Finally, petitioners insist (Pet. 3, 6, 14) that the trial judge on his own motion should have given an instruction on the law of circumstantial evidence as applied to conspiracy. Their proffered instruction on circumstantial evidence which was refused related only to wilfulness and intent (R. 357). Before the charge was given petitioners renewed their request for an instruction on circumstantial evidence, but only as it related to wilfulness. Now they claim that on the basis of the requested charge, the court of its own motion should have instructed as to the law of circumstantial evidence relating to conspiracies.

The trial judge correctly charged the jury as to what constitutes a conspiracy—an "agreement or combination on the part of the parties, by concerted action, to do an unlawful thing" (R. 313)—and that (R. 314) "in order for you to convict under this conspiracy count, you must believe beyond a reasonable doubt, first, that an unlawful agreement or understanding existed between the alleged conspirators, as charged, and second, that some one or more of these overt acts were actually committed as charged." In view of the direct evidence, including petitioners' own testimony (see R. 156, 157, 206, 207, 209, 210, 214-215) that they were acting in concert, petitioners were entitled to no more (*United States* v. *Skidmore,* 123 F. 2d 604 (C. A. 7), certiorari denied, 315 U. S. 800; *Bedell* v. *United States,* 78 F. 2d 358 (C. A. 8), certiorari denied, 296 U. S. 628), especially in the absence of a request for a specific instruction. Rule 30, F. R. Crim. P.

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CONCLUSION

The decision below is correct. No conflict of decisions is involved. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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